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NO. 83-1936

in the Supreme Court of the United States

October Term, 1983

AMERICAN INVESTMENT PROPERTIES, INC.,
a Florida corporation,
LEONARD E. TREISTER,
and JEROME J. COHEN,

Petitioners,

vs.

VAREKA INVESTMENTS, N.V.,
a Netherlands Antilles corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

AIP, Treister, and Cohen have stated the questions for review as follows:

I. WHETHER THE ASSUMPTION OF DIVERSITY JURISDICTION BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA WAS AN UNWARRANTED EXTENSION OF THE PROVISIONS OF 28 U.S.C. §1332.

II. WHETHER THE FEDERAL COURTS BELOW FAILED TO APPLY FLORIDA SUBSTANTIVE LAW, THUS VIOLATING PETITIONERS' DUE PROCESS RIGHTS AND THE ERIE DOCTRINE.

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The respondent, VAREKA INVESTMENTS, N.V. ("Vareka"; plaintiff and appellee below) respectfully requests that this Court deny the petition for writ of

certiorari of AMERICAN INVESTMENT PROPERTIES, INC., ("AIP"), LEONARD E. TREISTER ("Treister"), and JEROME J. COHEN ("Cohen"; all were defendants and appellants below). The petition should be denied because:

1. Neither the district court nor the court of appeals "extended" federal jurisdiction under 28 U.S.C. §1332; rather, both courts adhered strictly to legal standards previously approved by this Court; and

2. Both the district court and the court of appeals correctly applied Florida law. In fact, the opinion of the court of appeals was authored by a former member of the Supreme Court of Florida. This Court should resist the petitioners' attempt to have the Court review questions that relate solely to state law and, as here, lack federal law implications of any kind.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 724 F.2d 907 (11th Cir. 1984). That opinion denied all seven of the petitioners' (then appellants') points on appeal from unpublished decisions of the United States District Court for the Southern District of Florida. The district court decisions are set forth in the appendix to the petition at pages 22 through 44.

JURISDICTION

This Court has jurisdiction of the petition under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The first question sought to be reviewed involves 28 U.S.C. §1332(a) and (c); both are set forth on page 3 of the petition. In addition, the petitioners seek to challenge the "clearly erroneous" test under Fed. R. Civ. P. 52(a).

The second question sought to be reviewed does not involve any genuine federal issue, but claims that the decisions of the district court and the court of appeals misapplied Florida law and thereby violated the petitioners' "due process rights" under the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The "Statement of the Case" and "Statement of the Facts" in the petition include numerous statements and characterizations which are argumentative rather than factual. Accordingly, Vareka relies on the sections entitled "Facts" and "Procedural History" in the opinion of the United States Court of Appeals, Eleventh Circuit, reported at 724 F.2d 907, 908-09 (11th Cir. 1984).

Some of the allegations within the petitioners' "Statement of the Facts" are untrue. For example:

1. Actually Vareka was incorporated in part to acquire the office park in Miami at issue in the case below and in part for other investments in Ecuador and elsewhere. The petitioners state incorrectly that Vareka was formed only to acquire the office park.

2. Vareka had and has both officers and employees, and its records and office are outside of Florida in Quito, Ecuador.

3. Vareka conducted and continues to conduct corporate meetings, and all of its corporate decisions have been made in Quito.

4. The funds for investment by Vareka in the Miami office park were raised in Ecuador and only then were transmitted to a Miami bank account for payment to AIP.

5. AIP, Treister, and Cohen fail to distinguish properly between Vareka's pre-litigation and post-litigation activities in Florida. Vareka's post-litigation presence in Florida increased because of AIP's default; when AIP breached its fifteen-year net lease after only six months, Vareka and its foreign principals suddenly found themselves with an office park without long-term management. But Vareka's post-litigation presence in Florida—through its attorneys and new office park managers—is irrelevant, as the petitioners well know. Vareka's place of business was correctly determined *as of September, 1979*, the time at which Vareka commenced its litigation against AIP, Treister, and Cohen. *Ray v. Bird & Son Asset Realization Co.*, 519 F.2d 1081 (5th Cir. 1975).

6. AIP, Treister, and Cohen state incorrectly that, "Vareka conducts no corporate meetings". The record below shows that, like many closely-held corporations, Vareka did conduct business meetings when the two largest shareholders met in Quito to discuss the company and its activities.

7. AIP, Treister, and Cohen apparently attach significance to the fact that Vareka filed an application for authorization to transact business in Florida listing the address of its Miami attorneys as its principal office *in Florida*. As the district court and the court of appeals both recognized, that designation (required by state law) does not in any way suggest that Miami, Florida was Vareka's principal place of business *in the world* (any more than it does for IBM, General Electric, or other multinational

companies doing business in many states and in different countries). *Arab International Bank & Trust Co., Ltd. v. National Westminster Bank, Ltd.*, 463 F.Supp. 1145 (S.D.N.Y. 1979). As a matter of fact, the "principal office" on that form was actually designated "c/o" (in care of) the Miami address on the application, in recognition of the facts that (a) mail service to Ecuador is frequently delayed or interrupted and (b) any communication with Florida's legal authorities ultimately would be referred by Vareka to its Miami attorneys.

There are many facts which were proven below but which were not included by AIP, Treister, and Cohen in their petition. Important facts illustrating the correctness of the decisions below are:

8. Treister and Cohen (the principals of AIP) were veteran Florida real estate operators. Both are lawyers, and Treister has practiced as a real estate lawyer for thirty years (R4 118)*.

9. On the sale and leaseback transaction, AIP made a profit (distributable to its shareholders, officers and directors —Treister and Cohen) in excess of $760,000, although AIP had held the property only a year (R4 122-23; district court finding at R1 244). Treister and Cohen obtained the higher selling price from Vareka by "guaranteeing" Vareka a net minimum percentage return on its investment through the 15-year lease (Plaintiff's Ex. 1, §2.01; R4 108), which Treister and Cohen almost immediately breached.

10. Because of the defaults by AIP, Treister, and Cohen (now candidly admitted by AIP at page 7, paragraph 2 of the petition), Vareka suffered damages in excess of $540,000 (R1

*References to the record are to the four volumes of the Record on Appeal: "R1", "R2", "R3", and "R4"; Exhibits are abbreviated "Ex."

256-63). In their petition, AIP, Treister, and Cohen now concede that the damage amounts were correctly determined; they simply argue that Vareka should not be permitted to collect such damages (suffered during the period 1979-82) until 1994. Not surprisingly, both courts below rejected that "we'll pay it later" argument.

The foregoing facts illustrate that the equities, facts, and contract provisions all favored Vareka, and that the petitioners have consistently sought to delay judgment by raising meritless (but time-consuming) issues relating to jurisdiction and Florida's landlord-tenant damage principles. The default occurred in August, 1979, and the lawsuits were filed in September, 1979. Vareka has yet to recover the first cent from AIP, Treister, or Cohen over the intervening five years.

ARGUMENT

ISSUE I—THE DIVERSITY FINDINGS ARE CORRECT

This Court recently denied certiorari in another case presenting this issue—*Jerguson v. Blue Dot Investments, Inc.*, 659 F.2d 31 (5th Cir. 1981); *cert. den.*, 456 U.S. 946 (1982). The important and relatively new principle applied by the Fifth Circuit in *Jerguson*, and by the Eleventh Circuit in this case, is that foreign (in the international sense) corporations are to be analyzed under 28 U.S.C. §1332 just as are United States corporations; they are to be considered dual citizens of both (a) the foreign country in which they are organized and (b) the foreign country or state of the United States in which they maintain their "principal place of business".

The principle of dual citizenship for non-U.S. corporations represented a clear departure from the long-standing

"*Eisenberg* rule", which held that Section 1332(c) applied only to domestic corporations. *Eisenberg v. Commercial Union Assurance Co.*, 189 F.Supp. 500 (S.D.N.Y. 1960). This Court properly upheld the dual citizenship rule of *Jerguson* (which frequently defeats diversity and therefore reduces the federal docket) by denying certiorari.

AIP, Treister, and Cohen simply argue that the district court and court of appeals decided the facts incorrectly. They do not dispute that the "principal place of business" test is inherently factual, or that the case law presently governing the "principal place of business" test was correctly articulated and applied.

This Court does not grant certiorari to review evidence and discuss specific facts (*United States v. Johnston*, 268 U.S. 220, 227 (1925)), and this is particularly true where findings of fact have been concurred in by both the court of appeals and the district court. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). In the *Graver Tank* case, Justice Jackson stated that this Court's standard for review of concurrent findings by two courts below is, "a very obvious and exceptional showing of error". 336 U.S. at 275. That test is even *more stringent* than the "clearly erroneous" test of Fed.R.Civ.P. 52(a).

No error, much less a "very obvious and exceptional" error, has been shown by AIP, Treister, and Cohen. The district court's decisions respecting both jurisdiction and damages were based upon the live, open-court testimony (and cross-examination) of numerous witnesses, and are based upon substantial competent evidence. As the district court pointed out, why did the petitioners send their "lease termination telex" to Vareka in Quito, Ecuador in 1979 if they believed, as they say they do now, that Vareka's "principal place of business" was in Miami? The money for the project

and the decision-making came from Quito, and Vareka and its principals had no contact with the day-to-day operation of the office park in Miami until after the lawsuits were filed (R1 246). Vareka's books and records before the lawsuit were maintained in Quito (R1 247). Based upon that evidence, the concurring findings of fact by both the district court and the court of appeals, and the district court's opportunity to evaluate the credibility of the witnesses and weigh the evidence (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)), this Court should deny certiorari and thereby decline to serve as but a third fact-finder.

ISSUE II—FLORIDA LAW WAS CORRECTLY AND CONSTITUTIONALLY APPLIED.

It is important to recognize this argument of AIP, Treister, and Cohen for what it really is—a delay to obtain a lower interest rate. By filing this petition, AIP, Treister, and Cohen know that their judgment debt will accrue interest at only 12 percent per annum (Section 55.03, Florida Statutes). Current borrowing rates are considerably in excess of that rate. This petition is just another (and hopefully, the last) round in a five-year holding action against the petitioners' obligation ultimately to "pay the piper".

AIP, Treister, and Cohen offered both courts below a twisted interpretation of Florida law in support of the theory that Vareka's damages should not be calculated or assessed until 1994. Not surprisingly, the district court and court of appeals emphatically rejected that argument. At the time the district judge issued his final opinion, he had been a licensed and practicing Florida lawyer for twenty-two years. The author of the Eleventh Circuit's unanimous opinion has been a licensed and practicing Florida lawyer for twenty-five years, and has served on the Supreme Court of Florida. It is therefore difficult to accept seriously the petitioners' argument that both courts misapplied Florida law.

But it is even more difficult to accept the trumped-up constitutional claim that, by misapplying Florida law, those judges violated the "due process rights" of AIP, Treister, and Cohen. The simple answer to that claim is that no person or entity has a right, constitutional or otherwise, to intentionally default under lease and guaranty agreements, to cause over half a million dollars of damage to the other party to those agreements, and to then attempt to forestall until 1994 the time for payment of those damages.

If this Court denies certiorari, Vareka will at last, after five years of litigation, be able to recover part of its damages. AIP, Treister, and Cohen will not have been deprived of property without due process—they agreed to the damages provisions in the contract documents, they intentionally damaged Vareka, and they have been afforded five years of due process by two (and now, three) federal courts.

CONCLUSION

The case below is just an action for damages under state law for breach of a commercial lease. It has no federal or constitutional overtones. It involves questions of fact inappropriate for review by this Court. If the three-level federal court system is to work and this Court's difficult backlog is to be cleared, certiorari should be denied where, as here, both the first and second levels of the federal system have concurred in their analysis of the law and the record.

It is respectfully submitted that the petition should be denied.

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CERTIFICATE OF SERVICE

The undersigned counsel of record for the respondent hereby certifies that on July 12, 1984, he has served three (3) copies of the foregoing Brief in Opposition upon Lawrence H. Rogovin, Esquire, Rogovin & Schwartz, P.A., by causing the same to be delivered by messenger to his offices at 2020 N.E. 163rd Street, Suite 300, North Miami Beach, Florida 33162.

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